

UNITED STATES OF AMERICA BEFORE THE NATIONAL LABOR RELATIONS BOARD ATLANTA BRANCH OFFICE DIVISION OF JUDGES

FIBER CORPORATION AND DOMSEY INTERNATI	IONAL	
SALES CORPORATION, A Single Employer AND ARTHUR SALM, Individually	Case Nos.	29-CA-14548
		29-CA-14619
and		29-CA-14681
		29-CA-14735
INTERNATIONAL LADIES' GARMENT		29-CA-14845
WORKERS' UNION, AFL-CIO		29-CA-14853
		29-CA-14896
LOCAL 99, INTERNATIONAL LADIES'		29-CA-14983
GARMENT WORKERS UNION, AFL-CIO		29-CA-15012
		29-CA-15119
		29-CA-15124

DOMSEY TRADING CORPORATION, DOMSEY

29-CA-15137 29-CA-15147 29-CA-15323 29-CA-15324 29-CA-15332 29-CA-15393 29-CA-15413 29-CA-15447 29-CA-15685

RESPONDENTS' POST-HEARING BRIEF

Margolin & Pierce, LLP Attorneys for Respondents 111 West 57th Street – Suite 410 New York, NY 10019 212-247-4844

PRELIMINARY STATEMENT

On February 18, 2011 the United States Court of Appeals issued its decision declining to enforce two Supplemental Decisions and Orders of the Board against the corporate respondents *NLRB v. Domsey Trading Corp.*, 636 F.3d 33 (2nd Cir. 2011). It did so on the grounds that the Board had abused its discretion in upholding rulings of A.L.J. Marcionese limiting Respondents efforts to cross examine discriminatees as to their immigration status during the backpay period involved, contrary to the teachings of Hoffman Plastic Compounds, Inc. v. NLRB, 535 U.S. 137 (2002). The case was remanded for further proceedings consistent with the Court's opinion. The Board reassigned the case to A.L.J. Marcionese.

The Second Circuit, in remanding the case had the following to say, as relevant to the hearings conducted herein:

The Board makes one further argument in support of its application for enforcement that we must consider – that, <u>Hoffman</u> notwithstanding, the board may place some limits on immigration-related questioning in compliance proceedings. <u>The only limits the board may place on cross-examination are the usual limits the presider may place on cross-examination</u>. Such a limit <u>may</u>, for instance, require an employer, before embarking on a cross-examination of substantial number of claimants, to proffer a reason why its IRCA-required verification of immigration status with regard to a particular claimant now seems questionable, or in error.

While <u>Hoffman</u> was not an evidentiary decision, post-<u>Hoffman</u>, the immigration status of discriminatees has become relevant to the issue of whether backpay may be awarded. Although it is by no means a simple issue, we find that employers may question discriminatees about their immigration status, while also underscoring the Board's legitimate interest in fashioning rules that preserve the integrity of its proceedings.

¹ Although presently named in the caption of this proceeding, Respondent Arthur Salm was not at the time a party to it, did not become involved until the Board sought to pierce the Domsey corporations' corporate veil in 2010. The Board's reversal of the A.L.J.'s decision not to hold Salm liable for the corporations' debts is currently on appeal to the Second Circuit.

Relying upon the Second Circuit's clear statement that "the A.L.J. erred in not permitting Domsey to ask discriminatees about their immigration status during the back pay period". Respondents have consistently sought, throughout these proceedings, to have all the discriminatees whose immigration status have not been otherwise resolved, to be produced for the cross-examination wrongfully denied them.

POINT I

THE ERROR THAT BROUGHT ABOUT THE REMAIND IN THIS CASE HAS BEEN REPEATED

After holding that the A.L.J. had committed prejudicial error as above-noted, the Second Circuit went on to say:

In sum, we find that employers may cross-examine back pay applicants with regard to their immigration status, and leave it to the Board to fashion evidentiary rules consistent with *Hoffman*. We also conclude that the A.L.J. erred in not permitting Domsey to ask discriminatees direct questions about their immigration status during the back pay period. Moreover, the A.L.J. should have permitted Domsey to introduce the testimony of its immigration expert in order to meet its burden. We remand to the Board so that it may correct these errors, and trust that this case. Which concerns unfair labor practices committed almost twenty years ago, can be brought to its well-deserved conclusion.

(Emphasis added)

Read as written, it is clear that <u>after</u> generally acknowledging the board's right to fashion appropriate evidentiary rules, the Court of Appeals then specifically found that the A.L.J. had erred in not permitting Domsey to cross-examine as to immigration status and remanded the case to the Board "so that it may correct these errors."

In response to A.L.J. Marcionese's request for a list of witnesses to be examined Board counsel submitted their letter of April 11, 2012 asserting that only 27 out of the 202 discriminatees for whom over a million dollars in backpay had been awarded, need to be

presented for cross-examination. Part of the Board's rationale sought to differ between pre and post IRCA employees. However, on August 9, 2011, the NLRB, in Mezonos v. Bakery 357 NLRB No. 47 acknowledged that Hoffman Plastic, 535 U.S. 137 (2002) precluded it from awarding backpay to undocumented immigrant workers whether or not the employer had complied with IRCA. Thus, IRCA provides no basis upon which to deny cross-examination of any discriminatee in this case.

Request was made of A.L.J. Marcionese for an extension of time to review the record and submit a pre-trial memorandum. That request was opposed by NLRB counsel, to which we replied.

In response to the foregoing exchange, A.L.J. Marcionese issued his May 11, 2012 "Order Granting In Part Respondents' Request for Extension of Time," directing that Respondent show cause "why any discriminatees, other than the 33 identified in General Counsel's memorandum, should be required to submit to an examination of their immigration status and on what basis." Respondents' "Declaration Showing Cause Why Cross-Examination of Discriminatees As To Immigration Status Should Not Be Limited To The 33 Identified By General Counsel," dated May 24, 2012, was submitted in response.

Said Declaration expressly points out <u>inter alia</u>, that the Second Circuit held that prejudicial error had been committed by the Board in limiting cross-examination as to immigration status 'for the vast majority of discriminatees" and that 27 (or 33) out of 202 is not a "vast majority." The Board's argument that employees were exempt from examination because "expert" testimony at the prior hearing concerning social security numbers had established their immigration status was expressly refuted based on the written record. (See Exhibit 330, 335 and 336). Respondents argue for the right to cross-examine each discriminatee as to whom that right

had been earlier denied, consistent with <u>Hoffman Plastic</u> and the opinion of the Second Circuit. It was also pointed out that it has been decided that unauthorized aliens are not entitled to backpay whether or not IRCA has been complied with.

A.L.J. Marcionese, on June 4, 2012 then issued an Order Regarding Remand and Notice of Hearing (Exhibit H) in which he rejected Respondents' argument and accepted Board counsel's contentions as to which discriminatees may be examined on remand. He would limit examination as to others "only after a specific showing, as suggested by the Court of Appeals, that the IRCA required verification of immigration status upon which it relied when hiring the individual claimant 'now seems questionable or in error.'"

A.L.J. Marcionese properly labels that showing as a <u>suggestion</u> by the Court of Appeals and not a direction. As seen from that Court's opinion, quoted <u>supra</u>, it is a "may" and not a "must". Applying that requirement to this case, remanded because the cross-examination sought was wrongly denied where the backpay period occurred twenty years ago, the respondents' business long ago shut down and company records long gone, would make it impossible to correct the prejudicial error of the prior proceeding and will defeat the thrust and intent of <u>Hoffman Plastics</u>. The only way the issue can be fairly addressed is to permit cross-examination, where the persons involved can be asked direct questions as to their immigration status during the relevant time period.

On June 4, 2102 Respondents wrote to A.L.J. Marcionese, taking issue with his reasoning and interpretation of the Second Circuit Opinion, objected to the conduct of the hearing as limited by his Order pursuant to Section 102.41 of the Rules and Regulations and requested his recusal. A.L.J. Marcionese responded promptly with his Order denying Respondents' Motion for Recusal, pointing out that six formerly missing employees would be available for questioning

in addition to the 27 earlier identified. He reiterated the argument that a "showing" must be made in order to preserve the integrity of the Board's processes, to prove that Respondents' "desire" to question the discriminatees regarding their immigration status is more than a "fishing expedition". How compliance with a Court of Appeals direction to the NLRB to "correct" the prejudicial errors it has made can be seen as a "fishing expedition", defies comprehension.

POINT II

THE EVENTS SURROUNDING THE SEVERAL HEARINGS CONDUCTED HEREIN FURTHER DEMONSTRATE THE IMPORTANCE OF ALLOWING THE CROSS-EXAMINATION SOUGHT BY THE RESPONDENTS

Faced with the prospect of cross-examination of the 33 discriminatees hard-picked by the Board to testify, the claims of seven of them were withdrawn after the Board's scrutiny of their status, several including three of the 40 previously missing claimants never responded to the Board's subpoenas, the claims of others were voluntarily reduced by the Board and the immigration of several others properly documented.

Based upon this current demonstration of the inaccuracy of the Board's previous back pay calculations of a substantial proportion of the claimants it chose to produce, one must question what a similar review of the remaining claimants would show. It certainly provides an additional reason for those claimants to be subjected to the cross-examination sought by Respondents.

Further, after over 20 years, the claims of those 40 listed as "missing" as well as those who failed to respond to Board subpoenas should be dismissed out of hand, consistent with the Circuit Court's direction to bring this case to its well deserved conclusion.

POINT III

THE REFUSAL OF A.L.J. MARCIONESE
TO DIRECT THE BOARD TO SUBMIT THE ENTIRE LIST
OF DISCRIMINATEES TO THE DEPARTMENT OF HOMELAND
SECURITY(DHS) UNITED STATES CITIZENSHIP AND
IMMIGRATION SERVICES (VSCIS) TO DETERMINE
THEIR RIGHT TO WORK STATUS IN THE UNITED
STATES CONSTITUTES PREJUDICAL ERROR

At the hearing of September 19, 2012 Board Counsel presented the Declaration of Trisha Sparrow², Supervisory Services officer for Adjudication at the National Benefits Center. In discussion with the Court, Board Counsel stated that the provision of this Declaration was a federal agency to agency accommodation. Respondents had not been advised that the Board had requested such Declaration. Ms. Sparrow declares that she has reviewed the physical files and electronic records of USCIS, with respect to eleven of the discriminatees herein to determine when they had authorization to work in the United States – and provides that information. Such government sourced data is taken to be reliable and was stipulated to accordingly.

However, upon being apprised for the first time that such official data as to immigration status could be obtained on an agency to agency basis, request was promptly made that the Board be directed to request such data for the entire list of discriminatees whose status has not already been resolved. It was argued that the provision of such reliable data from the USCIS would be definitive and put an end to the need for further litigation and appeal. Board Counsel declined to cooperate³ and the A.L.J. ultimately denied Respondents' request.

Given that reliable data as to the immigration status of the discriminatees during the back pay period was now known to be available, which data could serve the very purpose of the remand, to correct the Boards' previous prejudicial error, the refusal of the Board to request that

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² (TR 10224)

³ (TR 10225-10228)

data and the A.L.J.'s denial of Respondents' request to direct the Board to request it, constitute additional prejudicial error.

CONCLUSION

The cross-examination of the employees which Respondents have sought is a <u>right</u> recognized by the Court of Appeals pursuant to <u>Hoffman Plastic</u>, which was wrongly curtailed at the time of the original hearings so as to constitute prejudicial error. It is submitted that basic due process is at issue here, which should have been honored by the Board, in lieu of imposing a procedural hurdle which, in the circumstances of this case, is plainly inappropriate and serves only to defeat the purpose and intent of both *Hoffman Plastic* and the Second Circuit's Opinion in this case.

The Court's refusal to require the Board to seek NCSIS data as to the right to work status of the non-produced discriminatees during the back pay period, which data would definitively serve the purpose of the remand, was error. The case should be reopened to provide for the provision of such data so that justice can be duly served. The claims of discriminatees still "missing" after 20 years should be dismissed, as well as the claims of those who failed to appear in response to subpoenas.

Absent the relief sought by Respondents, the claims of approximately 140 discriminatees will have been determined without their ever having been subjected to cross-examination as to their immigration status during the back pay period. This cannot be right.

Dated: New York, New York November 28, 2012

Margolin & Pierce, LLP Attorneys for Respondents

Errol F. Margolin 111 West 57th Street, Suite 410

New York, NY 10019

212-247-4844